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**VIA FIRST CLASS MAIL AND EMAIL**

Ms. Rebecca Kane  
U.S. Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
MC 222A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

***Re: Phelps Dodge Corporation Comments on ECHO***

Dear Ms. Kane:

Phelps Dodge Corporation (PD) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA's or Agency's) November 20, 2002, *Federal Register* notice (67 Fed. Reg. 70,079) regarding the Agency's new "Enforcement and Compliance History Online" database (hereinafter referred to as "ECHO").

Because of the abundant errors in the database, and the potential violation of the Paperwork Reduction Act with regard to the need for industry to monitor and report data errors, we request that EPA immediately remove the ECHO database from its web-site until it responds to the articulated concerns and data quality errors. PD submits these comments in advance of the Agency's March 31, 2003 deadline for receipt of comments on ECHO because of the serious concerns we have with the database.

**Statement of Interest**

PD is the world's second-largest producer of copper, a world leader in the production of molybdenum, the largest producer of molybdenum-based chemicals and continuous cast copper rod, and among the leading producers of magnet wire and carbon black. The company's two divisions, Phelps Dodge Mining Co. and Phelps Dodge Industries, employ approximately 14,500 people in 27 countries.

Based on its review of ECHO, PD identified a number of data errors in reports for PD facilities. These data errors are unfairly prejudicial to PD and, therefore, the company has a substantial interest in ECHO.

### **Comments**

In its notice, EPA requests responses to five questions (67 Fed. Reg. at 70,079). For convenience, PD repeats each question and provides its response. Further, PD provides additional comment on important issues associated with ECHO that were not identified by EPA.

## **I. EPA Questions and PD Responses**

### **A. Question 1**

Does this site provide meaningful and useful information about the compliance and enforcement program?

PD understands EPA's desire to provide the public with access to environmental information (*see* 67 Fed. Reg. at 70,070); however, the Agency must ensure that such information is accurate *prior* to its posting on the Internet. Based on its review of the ECHO database, PD found errors in more than 90 percent of the reports for PD facilities. Many of these individual facility reports contained multiple errors. Considering all the data presented, the accuracy is likely in the 1-3 percent range. While PD appreciates that the site provides the ability for companies to submit data errors, once incorrect information is posted and retrieved by the public, damage to a company's reputation has already occurred and it is difficult, if not impossible, to ameliorate this damage.

In its notice, EPA states that ECHO data "previously were available to the public primarily through Freedom of Information Act requests"; however, "the information was not available in a searchable Web format." 67 Fed. Reg. at 70,070. EPA provides no discussion in either its *Federal Register* notice or its "Frequently Asked Questions" link on the ECHO web-site to apprise the regulated community as to how EPA intends to ensure that no confidential business information is disclosed.

The Agency has established a set of regulations at 40 C.F.R. Part 2 for claiming confidential business information and, when responding to public requests for information, ensuring that such information is not released. Prior to releasing information through ECHO, we encourage EPA to undertake a rulemaking to amend 40 C.F.R. Part 2 to establish procedures by which EPA will, prior to its posting, review information proposed for posting on ECHO to ensure that confidential business information is not released. Further, PD would urge EPA to provide the regulated facility with the opportunity to review such information prior to its posting for confidential information and to ensure the accuracy of the information. Finally, we would encourage EPA, in a rulemaking to amend 40 C.F.R. Part 2 consistent with our recommendations, to

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impose sanctions on Agency personnel that post information on ECHO in violation of 40 C.F.R. Part 2 (*see, e.g.*, 40 C.F.R. § 2.211).

Regarding the usefulness of the information, PD has serious concerns with the public's ability to reach any conclusions about a facility's environmental compliance based on a review of ECHO data. Unless a lay person spends considerable effort studying the terms and various information contained in the tables, it will be difficult, if not impossible, to make any distinction between what might be a minor violation and something serious. This conclusion is supported in an article from the January 2, 2003, edition of the *Arizona Daily Star* in Tucson, Arizona.

In the article, the reporter, based on a review of the ECHO database, states that:

According to EPA records, Phelps Dodge has also been cited for water-discharge violations in the past two years at Miami, Bagdad, Morenci and Iron King, near Humboldt in Yavapai County.

No enforcement actions were taken in those cases, and records from before the two-year period were not immediately available.

*Id.*

We previously reported to EPA through the "data error reporting process" on the ECHO web-site specific errors relating to PD sites (including the sites mentioned in the article); however, this information has yet to be corrected and the article illustrates how this information (be it incorrect or correct, but not placed in its proper context) may improperly tarnish a company's reputation. In some instances, data errors were identified more than three to four months ago and have yet to be corrected. When a data error is identified, we encourage EPA to place "under review", "under protest", or other suitable language next to the data to alert a visitor to the site that the accuracy of the data is in question and, as such, should not be relied upon.

In summary, PD believes that EPA should remove the ECHO database from its web-site until such time that the accuracy of the information proposed to be contained thereon is verified by EPA, the States, and industry. Further, we believe that EPA should provide a summary of the significance of each violation (*e.g.*, a threat to human health or the environment or a mere "paperwork" violation). To that end, we urge EPA to establish a stakeholder group comprised of various interests (including industry) to assist the Agency in this effort. Finally, we believe that EPA should first amend its confidentiality regulations at 40 C.F.R. Part 2 to embrace the dissemination of information through ECHO prior to posting said information.

**B. Question 2**

Is the site easy to navigate?

Overall, PD believes that the site is easy to navigate; however, as previously discussed, we believe that the significance of the information contained thereon should be explained.

We would also encourage EPA to provide a better description of the search feature when “minor facilities” are selected. In the ECHO database, EPA includes federal and state information. According to EPA, by selecting the “Include Minor Facilities” option, data will be returned for all facilities, including those with only permits for which states are not required to submit data to EPA. If this option is not checked, only facilities with at least one major (federally reportable) permit will be returned.” ECHO, “How to Report an Error”.

The display of “State-only” information is another reason why EPA should allow facilities (in the first instance) to verify information prior to EPA posting it on ECHO. Although EPA states in the “Frequently Asked Questions” section of ECHO that the data posted thereon has been reviewed for accuracy, PD did not find this to be the case both with EPA and State-supplied information. It does not appear that EPA could review State-only information for accuracy as the information was not required to be provided to EPA under a federal statute. Thus, EPA relies on the States and the Environmental Council of the States (a non-profit association) to verify the accuracy of the information. As such, providing a facility with the opportunity to review State-only information prior to posting is crucial to ensure the accuracy of such information.

**C. Question 3**

Does the help text adequately explain the data?

No. Please see comments above. Also, the columns identified as “Violations” and “Current Significant Violations” are confusing and misleading. For example, the “Help” page describes a facility with a “Yes” in the “Violations” column as a facility that has had a violation in the last two years. This description is not very helpful because it fails to explain what constitutes a “violation” and the severity of a particular violation. Many facilities contained in the database have a “Yes” in the “Violations” column for minor National Pollutant Discharge Elimination System (NPDES) permit conditions or upset conditions that have not resulted in any type of enforcement action or in the issuance of a Notice of Violation (NOV). In some instances, the upsets were permitted; however, the ECHO database failed to recognize this important fact. This information should be placed in the proper context.

To place this information in context, we recommend that EPA refrain from using the term “Violations” or “Current Significant Violations” on the database. Instead, we

recommend the term “Incident.” This term is “neutral” and will not stigmatize a company. Further, use of this term instead of “Violations” or “Current Significant Violations” will be beneficial to EPA as the Agency will not need to define these terms under the various environmental programs.

Regarding the “Current Significant Violations” category, EPA, in its “Help” page, merely explains this column as meaning that “the facility is currently designated a High Priority Violator under the Clean Air Act (CAA) or is in Significant Noncompliance under the Clean Water Act or the Resource Conservation and Recovery Act (RCRA).” EPA fails to define what is meant by a “High Priority Violator” or to be in “Significant Noncompliance.” This information should be further explained.

Regarding NPDES data, EPA’s calculation of the percentages to show exceedances is flawed. The procedure is not defined for how this calculation is made and, as such, the public is not provided the information necessary to place this information in context and industry is unable to verify EPA’s calculations. Further, as currently reported, the data are misleading because they imply that a violation occurred over an entire quarter when, in fact, an effluent exceedance is typically based on a single, discrete sample that was reported on a monthly Discharge Monitoring Report (DMR). We encourage EPA to remove DMR information from the web-site. Similarly, multiple exceedances may be limited to a single precipitation event where the discharge at issue may have only occurred for a few hours.

#### **D. Question 4**

What additional features, content, and/or modifications would improve the site?

Please see above comments. Further, we would encourage EPA, should the Agency not adopt our suggestion to provide industry with the ability to review proposed information for posting prior to posting, to withdraw information when an error regarding same is presented until such time that the error can be verified and corrected. Under the current format, EPA provides facilities with the ability to identify errors; however, the erroneous information remains on the site until the next scheduled “refresh.” As it currently exists, such a refresh occurs once a month starting on the first day of the month. During that period of time, the erroneous information continues to be available. To avoid unfair prejudice to a company, the information should be promptly removed when an error is submitted until such time that it can be resolved.

#### **E. Question 5**

For members of the regulated community, were your facility reports accurate?

Please see previous answers.

For members of the regulated community, if you did need to submit an online error report, was the error reporting process easy to use?

Yes, the error reporting process was easy to use; however, the inaccuracy of so much of the data made review and submission of the numerous reports time consuming.

## **II. Additional Comments**

### **A. EPA's ECHO Database Violates the Paperwork Reduction Act**

In addition to the previous comments in response to EPA's questions, we would also encourage EPA to estimate the burden on industry to regularly review ECHO and provide information regarding errors on same to EPA. The only way for industry to ensure that the information contained on ECHO is accurate so that a company's name is not tarnished through inaccurate information, or to ensure that a facility's reputation in the community is not damaged, is to regularly review ECHO and provide notice of errors regarding same to EPA. In fact, EPA encourages such a review by challenging the public to "assist us in maintaining high quality information in our systems." ECHO, "How to Report an Error".

We would argue that ECHO, through its *de facto* requirement for industry to regularly review the information contained thereon and report errors regarding same, is a "collection of information" as defined in the Paperwork Reduction Act (PRA) of 1995. Under the PRA, a "collection of information" is defined as, *inter alia*, "answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons . . ." 44 U.S.C. § 3502(3). By recognizing that errors may be present on ECHO, and encouraging facilities and others to correct same, EPA is requesting "answers" (*i.e.*, corrections) to "identical questions" (*i.e.*, is the ECHO information correct?) from ten or more persons (*i.e.*, every entity identified on ECHO). As such, EPA must comply with the PRA before posting information on ECHO.

Under the PRA, a federal agency (such as EPA) must "not conduct or sponsor the collection of information" unless in advance of same the agency conducts a detailed review of the burden associated with the collection request, provides the opportunity for comment on said assessment, and submits to the Office of Management and Budget Director the proposed information collection request. *See* 44 U.S.C. §§ 3506, 3507. It is our understanding that EPA has not performed any of these activities in violation of the PRA. Because EPA has not complied with the PRA, or explained why it is not applicable, we suggest that the Agency remove ECHO from the Internet until such time that EPA issues a *Federal Register* notice in compliance with the PRA or explains why such compliance is not necessary.

To minimize the burden on industry with regard to the need to review the ECHO database, we encourage EPA to provide a company with notice of any upcoming additions to the database regarding their facilities prior to posting. EPA could provide this option to a company

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by requesting interested companies to provide contact information. Then, when new data are posted, an e-mail alert could be sent to the company contact so that the information may be reviewed for accuracy prior to posting.

**B. TRI Information Should Not be Included on the ECHO Database**

In addition to providing "compliance" history, the ECHO database also includes information regarding facility "toxic release inventory" (TRI) information, submitted by facilities pursuant to the Emergency Planning and Community Right-to-Know Act (EPCRA). TRI data should not be included on the ECHO database because it has no bearing on a facility's compliance with environmental laws and regulations.

Further, the way EPA reports TRI information is troubling. With regard to Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act issues, ECHO purports to represent a facility's compliance history over the last two years. However, with regard to TRI information, the Agency aggregates a facility's reported TRI information over all the years that the facility has filed TRI reports. Because TRI information was first collected in 1988, it is possible that aggregate numbers from 14 years of production are included on ECHO.

PD believes that the inclusion of TRI information on the ECHO database is inappropriate and should be removed. We incorporate by reference the comments on the ECHO database, in general, and the comments on the improper inclusion of the TRI information, in particular, submitted by the National Mining Association (NMA). PD is a member of the NMA.

**Conclusion**

PD appreciates EPA's desire to provide the public with facility information; however, such information must be accurate in the first instance so that a company or a facility's reputation is not tarnished. Further, EPA must comply with the PRA requirements, or explain why they are not applicable, before launching the ECHO site.

Should you have any questions regarding our comments, please call me at (602) 366-7826.

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Very truly yours,

By:

Richard N. Mohr  
Director, Environment, Land and Water  
Development

Attachment

cc: Mitchell E. Daniels, Jr., OMB Director  
John Graham, Ph.D., Director, Office of Information  
And Regulatory Affairs, OMB